

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONNIE L. OAKES,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. CV-09-365-JPH

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 16.) Attorney Rebecca M. Coufal represents plaintiff; Special Assistant United States Attorney L. Jamala Edwards represents defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** plaintiff's Motion for Summary Judgment and **GRANTS** defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Connie L. Oakes (plaintiff) protectively filed for disability insurance benefits (DIB) and supplemental security income (SSI) on September 25, 2006. (Tr. 86, 100.) Plaintiff alleged an onset date of January 1, 1997. (Tr. 86.) Benefits were denied initially and on reconsideration. (Tr. 51, 56.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ Paul L. Gaughen on September 2, 2008. (Tr. 23-48.) Plaintiff was represented by counsel and testified at the hearing. (Tr. 26-41.) Vocational expert Daniel McKinney also testified. (Tr. 41-47.) The ALJ denied benefits (Tr. 11-20) and the Appeals Council denied review. (Tr. 1.) The matter is now before this court

pursuant to 42 U.S.C. § 405(g).

STATEMENT OF FACTS

The facts of the case are set forth in the administrative hearing transcripts, the ALJ decisions, and the briefs of plaintiff and the Commissioner, and will therefore only be summarized here.

Plaintiff was 53 years old at the time of the hearing. (Tr. 42.) She has a bachelor's degree with a major in applied psychology and a minor in drug/alcohol treatment. (Tr. 42, 330.) Plaintiff has work experience in child care, as a home attendant, and as a drug counselor. (Tr. 41-42, 130, 330.) She used to have a chemical dependency counselor's license. (Tr. 39.) Plaintiff testified that her predominant condition is fibromyalgia. (Tr. 27.) She reported pain in muscles and nerves and problems with memory and stress. (Tr. 123.) She is in pain every day due to fibromyalgia. (Tr. 28.) She has a hearing impairment and wears hearing aids. (Tr. 27.) She has experienced depression and complains of memory loss. (Tr. 35, 38.) Plaintiff has also complained of chronic back pain associated with degenerative disc disease. (Tr. 329.)

STANDARD OF REVIEW

Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877

1 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

2 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402
 3 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its
 4 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 5 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the
 6 proper legal standards were not applied in weighing the evidence and making the decision. *Browner v.*
 7 *Sec’y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
 8 evidence to support the administrative findings, or if there is conflicting evidence that will support a
 9 finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v.*
 10 *Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

11 SEQUENTIAL PROCESS

12 The Social Security Act (the “Act”) defines “disability” as the “inability to engage in any
 13 substantial gainful activity by reason of any medically determinable physical or mental impairment which
 14 can be expected to result in death or which has lasted or can be expected to last for a continuous period
 15 of not less than twelve months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides
 16 that a plaintiff shall be determined to be under a disability only if his impairments are of such severity
 17 that plaintiff is not only unable to do his previous work but cannot, considering plaintiff’s age, education
 18 and work experiences, engage in any other substantial gainful work which exists in the national economy.
 19 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical
 20 and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

21 The Commissioner has established a five-step sequential evaluation process for determining
 22 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
 23 engaged in substantial gainful activities. If the claimant is engaged in substantial gainful activities,
 24 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I).

25 If the claimant is not engaged in substantial gainful activities, the decision maker proceeds to step
 26 two and determines whether the claimant has a medically severe impairment or combination of
 27 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe
 28 impairment or combination of impairments, the disability claim is denied.

1 If the impairment is severe, the evaluation proceeds to the third step, which compares the
 2 claimant's impairment with a number of listed impairments acknowledged by the Commissioner to be
 3 so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii);
 4 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, the
 5 claimant is conclusively presumed to be disabled.

6 If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to
 7 the fourth step, which determines whether the impairment prevents the claimant from performing work
 8 he or she has performed in the past. If plaintiff is able to perform his or her previous work, the claimant
 9 is not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
 10 functional capacity ("RFC") assessment is considered.

11 If the claimant cannot perform this work, the fifth and final step in the process determines whether
 12 the claimant is able to perform other work in the national economy in view of his or her residual
 13 functional capacity and age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
 14 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

15 The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement
 16 to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
 17 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant establishes that a physical or
 18 mental impairment prevents him from engaging in his or her previous occupation. The burden then
 19 shifts, at step five, to the Commissioner to show that (1) the claimant can perform other substantial
 20 gainful activity and (2) a "significant number of jobs exist in the national economy" which the claimant
 21 can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

22 ALJ'S FINDINGS

23 At step one of the sequential evaluation process, the ALJ found plaintiff engaged in substantial
 24 gainful activity from 1998-2003. (Tr. 13.) The ALJ therefore found plaintiff was not disabled from
 25 January 1998 to December 2003, but considered the plaintiff for disability for the years 1997 and 2004
 26 to the date of the decision. (Tr. 13.) At step two, the ALJ found plaintiff has the following severe
 27 impairments: hearing loss, plantar fasciitis, and degenerative disc disease. (Tr. 13.) At step three, the
 28 ALJ found that plaintiff does not have an impairment or combination of impairments that meets or

1 medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr. 15.) The ALJ
2 then determined:

3 [C]laimant has the residual functional capacity to perform light work as
4 defined in 20 CFR 404.1567(b) except that she requires hearing assistive
5 devices and a sit/stand option. She requires a quieter environment without
6 concentrated noise, and may require repetition of the spoken word.

7 (Tr. 15.) At step four, the ALJ found plaintiff is capable of performing past relevant work as a child care
8 worker. (Tr. 19.) Alternatively, after taking into account plaintiff's age, education, work experience,
9 residual functional capacity and the testimony of a vocational expert, the ALJ concluded there are a
10 significant number of jobs existing in the national economy that plaintiff can perform. (Tr. 19.) Thus,
11 the ALJ concluded plaintiff has not been disabled within the meaning of the Social Security Act at any
12 time from the date the application was filed through the date of the decision.

13 ISSUES

14 The question is whether the ALJ's decision is supported by substantial evidence and free of legal
15 error. Specifically, plaintiff asserts the ALJ: (1) failed to find fibromyalgia is a severe impairment; (2)
16 improperly rejected the opinion of a treating physician; (3) made an unsupported credibility finding; and
17 (4) posed an incomplete hypothetical to the vocational expert. (Ct. Rec. 15 at 4-14.) Defendant argues
18 the ALJ: (1) properly determined fibromyalgia is not a medically determinable impairment; and (2)
19 properly evaluated plaintiff's testimony; (3) properly evaluated the medical opinion evidence; and (4)
20 propounded a complete hypothetical to the vocational expert. (Ct. Rec. 17 at 6-15.)

21 DISCUSSION

22 1. Credibility

23 Plaintiff argues the ALJ did not provide the necessary legal basis in finding Plaintiff not
24 credible. (Ct. Rec. 15 at 10-13.) In social security proceedings, the claimant must prove the
25 existence of a physical or mental impairment by providing medical evidence consisting of signs,
26 symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice.
27 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated on the basis of a medically
28 determinable impairment which can be shown to be the cause of the symptoms. 20 C.F.R. § 416.929.

Once medical evidence of an underlying impairment has been shown, medical findings are not
required to support the alleged severity of the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th

1 Cir. 1991) If there is evidence of a medically determinable impairment likely to cause an alleged
 2 symptom and there is no evidence of malingering, the ALJ must provide specific and cogent reasons
 3 for rejecting a claimant's subjective complaints. *Id.* at 346. The ALJ may not discredit pain testimony
 4 merely because a claimant's reported degree of pain is unsupported by objective medical findings.
 5 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). The following factors may also be considered: (1)
 6 the claimant's reputation for truthfulness; (2) inconsistencies in the claimant's testimony or between
 7 his testimony and his conduct; (3) claimant's daily living activities; (4) claimant's work record; and
 8 (5) testimony from physicians or third parties concerning the nature, severity, and effect of claimant's
 9 condition. *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).

10 If the ALJ finds that the claimant's testimony as to the severity of pain and impairments is
 11 unreliable, the ALJ must make a credibility determination with findings sufficiently specific to permit
 12 the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony. *Morgan v. Apfel*,
 13 169 F.3d 599, 601-02 (9th Cir. 1999). In the absence of affirmative evidence of malingering, the
 14 ALJ's reasons must be "clear and convincing." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th
 15 Cir. 2007); *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *Morgan*, 169 F.3d at 599. The
 16 ALJ "must specifically identify the testimony she or he finds not to be credible and must explain what
 17 evidence undermines the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir.
 18 2001)(citation omitted).

19 In this case, the ALJ identified no affirmative evidence of malingering, so clear and
 20 convincing reasons supported by substantial evidence are required to properly reject plaintiff's
 21 testimony.¹ Plaintiff seems to suggest the ALJ provided no reasons for discrediting Plaintiff's pain
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23
 24 ¹Defendant argues "only specific reasons are required to reject a claimant's symptoms testimony"
 25 and that the court must defer to a "specific reasons" standard found in S.S.R. 96-7p. (Ct. Rec. 17 at 9-
 26 10.) Social Security Rulings are issued to clarify the Commissioner's regulations and policy. They are
 27 not published in the federal register and do not have the force of law. However, under the case law,
 28 deference is to be given to the Commissioner's interpretation of the Regulations. *Ukolov v. Barnhart*,
 420 F.3d 1002 n.2 (9th Cir. 2005); *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3 (9th Cir. 1991). S.S.R. 96-

1 testimony. (Ct. Rec. 15 at 13.) However, in assessing plaintiff's alleged pain symptoms, the ALJ
2 considered several factors. (Tr. 17.)

3 The ALJ first considered the objective evidence in assessing plaintiff's credibility. (Tr. 17.)
4 While subjective pain testimony may not be rejected solely because it is not corroborated by objective
5 medical findings, the medical evidence is a relevant factor in determining the severity of a claimant's
6 pain and its disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); 20 C.F.R. §
7 416.929(c)(2). The ALJ observed that plaintiff stated in October 2004 that she had no low back pain
8 and she did "a lot of hiking." (Tr. 17, 217, 219.) In fact, plaintiff's complaints of foot pain were
9 attributed to "overuse" by Dr. Hough. (Tr. 219.) The first reference to back-related pain was in
10 March 2006, when plaintiff complained of pain down her left leg and numbness in the foot. (Tr. 227.)
11 Dr. Koeske, a treating physician, diagnosed lumbar radiculopathy and recommended plaintiff avoid
12 prolonged sitting, bending at the waist, mopping, and lifting more than ten pounds. (Tr. 227.) Later

13 _____
14 7p provides: "The determination or decision must contain specific reasons for the finding on credibility,
15 supported by the evidence in the case record, and must be sufficiently specific to make clear to the
16 individual and any other reviewers the weight given . . . and the reasons for that weight." S.S.R. 96-7p.
17 The ruling says the reasons have to be more than just "specific", they have to be "sufficiently specific to
18 make clear", which is similar to "clear and convincing." A long line of cases, including some which
19 predate S.S.R. 96-7p, are established law which set forth "clear and convincing reasons" as the requisite
20 basis for a negative credibility finding. *E.g.*, *Carmickle v. Comm'r*, 533 F.3d 1155, 1161 (9th Cir. 2008);
21 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007); *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,
22 883 (9th Cir. 2006); *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *Holohan v. Massanari*, 246
23 F.3d 1195, 1208 (9th Cir. 2001); *Morgan v. Comm'r*, 169 F.3d 595, 599 (9th Cir. 1999); *Smolen v. Chater*,
24 80 F.3d 1273, 1284 (9th Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *Swenson v.*
25 *Sullivan*, 876 F.2d 683, 687 (9th Cir. 1989); *Gallant v. Heckler*, 753 F.2d 1450, 1455 (9th Cir. 1984). It
26 is noted that case law also includes the requirement that reasons for a negative credibility determination
27 be "specific" and supported by substantial evidence in addition to meeting the clear and convincing
28 standard. *Id.* Thus, S.S.R. 96-7p and precedent established by case law are not mutually exclusive.

1 that month, the results of an MRI were “basically totally normal” and revealed “very mild”
2 degenerative changes according to another treating physician, Dr. Hough. (Tr. 228.) On exam, Dr.
3 Hough noted plaintiff’s lower back was a little sore, but she had excellent flexion, negative straight
4 leg raising, and good neurosensory function. (Tr. 228.) In May 2007, Dr. Hough noted tenderness in
5 plaintiff’s lower back, but also found good range of motion and a normal neurosensory exam. (Tr.
6 265.) By 2008, none of the office visit records mention back pain or degenerative disc disease as a
7 condition or complaint. (Tr. 284, 294, 297, 303, 305, 323, 326, 333, 338.) The objective evidence
8 does not support allegations of a disabling back condition or the limitations alleged by plaintiff. This
9 is relevant consideration in assessing plaintiff’s credibility.

10 The ALJ also considered relatively conservative course of treatment recommended by Dr.
11 Hough. (Tr. 17.) The type, dosage, effectiveness and side effects of medication taken to alleviate
12 pain or other symptoms as well as the medical treatment received to relieve pain or other symptoms
13 are relevant factors in evaluating the intensity and persistence of symptoms. 20 C.F.R. §§
14 416.929(c)(3)(iv) and 416.929.(c)(3)(v). Dr. Hough indicated there was no reason to pursue an EMG
15 and suggested physical therapy or chiropractic manipulation in addition to a hydrocodone
16 prescription. (Tr. 228.) At an initial evaluation in June 2007, Plaintiff’s physical therapist noted a
17 slight reduction in lumbar mobility, but did not reproduce the symptoms plaintiff complained about.
18 (Tr. 257.) After four treatments, plaintiff had reduced pain and hydrocodone usage. (Tr. 254.)
19 However, plaintiff was discharged from therapy because she did not initiate contact after returning
20 from summer vacation. (Tr. 255.) The ALJ noted that the physical therapy records indicate plaintiff
21 experienced beneficial results but only attended for a short time. (Tr. 17.) The ALJ is permitted to
22 consider a lack of treatment in assessing credibility. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
23 2005). It is reasonable to conclude that plaintiff’s failure to pursue additional treatment which
24 provides relief from symptoms indicates those symptoms are not as disabling as alleged. The ALJ
25 properly considered the conservative treatment and the improvement in symptoms after physical
26 therapy as factors in the credibility determination.

27 Another factor considered by the ALJ in assessing plaintiff’s credibility is the consistency of
28 plaintiff’s own statements. In making a credibility evaluation, the ALJ may rely on ordinary

1 techniques of credibility evaluation. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). A strong
2 indicator of credibility is the consistency of the individual's own statements made in connection with
3 the claim for disability benefits and statements made to medical professionals. S.S.R. 96-7p. The
4 ALJ pointed out that at the hearing, plaintiff testified she can only sit for ten minutes and that she
5 cannot lift a gallon of milk without pain, but in a Function Report completed in December 2006, she
6 indicated no limitations with sitting and the ability to lift up to 20 pounds. (Tr. 31-32, 33, 127.) The
7 ALJ also observed that plaintiff reported she was unable to squat, bend or kneel and memory and
8 immunity problems, but the medical evidence does not support these statements. (Tr. 18, 127, 223,
9 330.) Plaintiff argues these are "minor discrepancies,"² but they are significant in assessing plaintiff's
10 credibility and alleged limitations. These inconsistencies could reasonably be interpreted as evidence
11 of exaggeration of symptoms, particularly since plaintiff fails to identify any evidence explaining the
12 apparent increase in pain and symptoms. In addition, the ALJ pointed out that Dr. Scottolini, who
13 reviewed the medical evidence, opined that plaintiff exaggerates her symptoms and that there is little
14 objective clinical evidence to support and establish her alleged problems. (Tr. 18, 205.) As a result,
15 the ALJ properly considered the inconsistencies in the degree of plaintiff's reported symptoms as a
16 reason for rejecting her pain complaints.

17 Plaintiff does not argue that the factors considered by the ALJ were improper or address the
18 ALJ's credibility determination with any specificity. The ALJ considered appropriate factors in
19 assessing plaintiff's credibility, and the ALJ's interpretation of the evidence was reasonable. Thus,
20 the ALJ provided clear and convincing reasons supported by substantial evidence in rejecting
21 plaintiff's credibility and the ALJ did not err.

22 **2. Step Two**

23 Plaintiff argues the ALJ committed legal error by failing to find fibromyalgia is a severe
24 impairment. (Ct. Rec. 15 at 6-8.) At step two of the sequential process, the ALJ must determine
25 whether Plaintiff suffers from a "severe" impairment, i.e., one that significantly limits his or her
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27 ²This argument is made in Plaintiff's letter brief to the Appeals Council dated December 1, 2008,
28 which plaintiff incorporates by reference in her summary judgment memorandum. (Ct. Rec. 15 at 4, Tr.
6.)

1 physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). To satisfy step two's
2 requirement of a severe impairment, the claimant must prove the existence of a physical or mental
3 impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings;
4 the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. § 416.908. The fact that
5 a medically determinable condition exists does not automatically mean the symptoms are "severe" or
6 "disabling" as defined by the Social Security regulations. *See e.g. Edlund*, 253 F.3d at 1159-60; *Fair*,
7 885 F.2d at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

8 The Commissioner has passed regulations which guide dismissal of claims at step two. Those
9 regulations state an impairment may be found to be not severe when "medical evidence establishes
10 only a slight abnormality or a combination of slight abnormalities which would have no more than a
11 minimal effect on an individual's ability to work." S.S.R. 85-28. The Supreme Court upheld the
12 validity of the Commissioner's severity regulation, as clarified in S.S.R. 85-28, in *Bowen v. Yuckert*,
13 482 U.S. 137, 153-54 (1987). "The severity requirement cannot be satisfied when medical evidence
14 shows that the person has the ability to perform basic work activities, as required in most jobs."
15 S.S.R. 85-28. Basic work activities include: "walking, standing, sitting, lifting, pushing, pulling,
16 reaching, carrying, or handling; seeing, hearing, and speaking; understanding, carrying out and
17 remembering simple instructions; responding appropriately to supervision, coworkers and usual work
18 situations; and dealing with changes in a routine work setting." *Id.*

19 Further, even where non-severe impairments exist, these impairments must be considered in
20 combination at step two to determine if, together, they have more than a minimal effect on a
21 claimant's ability to perform work activities. 20 C.F.R. § 416.929. If impairments in combination
22 have a significant effect on a claimant's ability to do basic work activities, they must be considered
23 throughout the sequential evaluation process. *Id.* As explained in the Commissioner's policy ruling,
24 "medical evidence alone is evaluated in order to assess the effects of the impairments on ability to do
25 basic work activities." S.S.R. 85-28 Thus, in determining whether a claimant has a severe
26 impairment, the ALJ must evaluate the medical evidence.

27 In this case, the ALJ specifically discussed the medical record pertaining to fibromyalgia in
28 finding it is not a severe impairment. (Tr. 14.) The first mention of fibromyalgia in the record is in

1 October 2004 when Dr. Hough, plaintiff's treating physician, mentioned a history of fibromyalgia.
2 (Tr. 217.) Fibromyalgia does not appear in the record again until June 2006, when Dr. Hough noted
3 the diagnosis and that plaintiff was stable. (Tr. 230.) In early 2007, plaintiff complained of pain due
4 to fibromyalgia, but also reported becoming concerned about becoming addicted to hydrocodone for
5 the pain. (Tr. 239, 244.) Dr. Hough again noted plaintiff was stable and continued amitryptilline.
6 (Tr. 245.) The ALJ observed that despite these references to fibromyalgia, there is no evidence of
7 clinical assessment or consistent treatment for the symptoms. (Tr. 14.)

8 As noted above, an impairment must be established by medical evidence consisting of signs,
9 symptoms, and laboratory findings, not only by a claimant's statement of symptoms. 20 CFR §
10 416.908, 416.928(a). Signs are anatomical, physiological, or psychological abnormalities which can
11 be observed, apart from a claimant's stated symptoms, and must be shown by medically acceptable
12 clinical diagnostic techniques. 20 C.F.R. § 416.928(b). As defendant points out, there is no evidence
13 in the record that an acceptable medical source applied any specific diagnostic criteria in diagnosing
14 plaintiff with fibromyalgia. (Ct. Rec. 17 at 8.) The American College of Rheumatology established
15 classification criteria for fibromyalgia, including both a history of widespread pain and pain in 11 of
16 18 tender points on digital palpation. Frederick Wolfe et al., *The American College of Rheumatology*
17 *1990 Criteria for the Classification of Fibromyalgia*, 33 ARTHRITIS AND RHEUMATOLOGY. 160,
18 February 1990.³ In *Rollins v. Massanari*, the Ninth Circuit recognized:

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20
21 ³Found at www.rheumatology.org/practice/clinical/classification/fibromyalgia/fibro.asp. A
22 provisional set of criteria for clinical diagnosis of fibromyalgia was published in May 2010 and includes
23 the calculation of a "widespread pain index" and a "symptom severity score" along with other criteria.
24 Frederick Wolfe et al., *The American College of Rheumatology Preliminary Diagnostic Criteria for*
25 *Fibromyalgia and Measurement of Symptom Severity*, 62 ARTHRITIS CARE AND RESEARCH 600, 607
26 (2010),
27 http://www.rheumatology.org/practice/clinical/classification/fibromyalgia/2010_preliminary_diagnostic_criteria.pdf. The provisional criteria was not, of course, available as a diagnostic tool during the period
28 at issue.

[Fibromyalgia's] cause or causes are unknown, there is no cure, and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia. The principal symptoms are 'pain all over,' fatigue, disturbed sleep, stiffness, and 'the only symptom that discriminates between it and other diseases of a rheumatic character' multiple tender spots, more precisely 18 fixed locations on the body (and the rule of thumb is that the patient must have at least 11 of them to be diagnosed as having fibromyalgia) that when pressed firmly cause the patient to flinch.

Rollins v. Massanari, 261 F.3d 853, 855 (9th Cir. 2001) (quoting *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996)). The record is not clear as to the basis of the diagnosis in this case, and the ALJ reasonably interpreted the ambiguity as plaintiff's own reported history. (Tr. 14.) Plaintiff points to her testimony that Dr. Hough diagnosed her with fibromyalgia "maybe" a year or two before 1993 by doing a "touch exam in the tender spots where I was hurting." (Tr. 26.) When asked how many tender spots Dr. Hough found, plaintiff testified, "I'm not sure, I'm not sure. Probably eight or ten, something like that." (Tr. 27.) First, the ALJ made a properly supported negative credibility finding, so an argument dependent on plaintiff's testimony alone is not reliable. Second, plaintiff's testimony is vague at best. Third, even if plaintiff's testimony is accepted as true, it does not further establish fibromyalgia, since at least 11 tender points are required to support classification as fibromyalgia under the 1990 classification criteria and by plaintiff's own equivocal testimony, only eight or ten were identified. There is virtually no evidence beyond plaintiff's own statements establishing fibromyalgia as a medically determinable impairment, and the ALJ finding to that effect is supported by the record.

Plaintiff suggests the ALJ had a duty to develop the record with respect to her fibromyalgia diagnosis. (Tr. 6.) In Social Security cases, the ALJ has a special duty to develop the record fully and fairly and to ensure that the claimant's interests are considered, even when the claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983). The regulations provide that the ALJ may attempt to obtain additional evidence when the evidence as a whole is insufficient to make a disability determination, or if after weighing the evidence the ALJ cannot make a disability determination. 20 C.F.R. § 404.1527(c)(3); *see also* 20 C.F.R. 404.1519a. Ambiguous evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ's duty to "conduct an appropriate inquiry." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996); *Armstrong v. Comm'r of*

1 *Soc. Sec. Admin.*, 160 F.3d 587, 590 (9th Cir.1998). An ALJ's duty to develop the record further is
2 triggered only when there is ambiguous evidence or when the record is inadequate to allow for proper
3 evaluation of the evidence. *Tonapetyan*, 242 F.3d at 1150. In this case, the record before the ALJ
4 was neither ambiguous nor inadequate to allow for proper evaluation of the evidence. *See Mayes v.*
5 *Massanari*, 276 F.3d 453, 460 (9th Cir. 2001).

6 Even if other records establish a convincing fibromyalgia diagnosis, plaintiff has established
7 no "severe" or "disabling" limitations resulting from fibromyalgia. No treating or examining
8 provider opined or even suggested that fibromyalgia symptoms were limiting or disabling. Indeed, at
9 plaintiff's last comprehensive examination in January 2008, Dr. Hough noted a normal physical
10 examination and made no comment about fibromyalgia except to continue medications. (Tr. 286-87.)
11 Through the remainder of 2008, office visit records do not mention any complaint or discussion of
12 fibromyalgia. (Tr. 294, 297, 303, 305, 323, 326, 333, 338.) These facts suggest fibromyalgia has
13 little impact on plaintiff's ability to perform basic work-related activities. As a result, the ALJ did not
14 err by failing to find fibromyalgia is a severe impairment.

15 **3. Opinion Evidence**

16 Plaintiff argues the ALJ improperly evaluated the medical and psychological opinion
17 evidence. (Ct. Rec. 13 at 14.) In disability proceedings, a treating physician's opinion carries more
18 weight than an examining physician's opinion, and an examining physician's opinion is given more
19 weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir.
20 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's
21 opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81
22 F.3d at 830. If contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons
23 that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th
24 Cir. 1995). Historically, the courts have recognized conflicting medical evidence, the absence of
25 regular medical treatment during the alleged period of disability, and the lack of medical support for
26 doctors' reports based substantially on a claimant's subjective complaints of pain as specific,
27 legitimate reasons for disregarding a treating or examining physician's opinion. *Flaten v. Secretary*
28 *of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*, 885 F.2d at 604.

1 The opinion of a non-examining physician cannot by itself constitute substantial evidence that
2 justifies the rejection of the opinion of either an examining physician or a treating physician. *Lester*,
3 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). However, the opinion
4 of a non-examining physician may be accepted as substantial evidence if it is supported by other
5 evidence in the record and is consistent with it. *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31.
6 Cases have upheld the rejection of an examining or treating physician based on part on the testimony
7 of a non-examining medical advisor; but those opinions have also included reasons to reject the
8 opinions of examining and treating physicians that were independent of the non-examining doctor's
9 opinion. *Lester*, 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989)
10 (reliance on laboratory test results, contrary reports from examining physicians and testimony from
11 claimant that conflicted with treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9th Cir.
12 1995) (rejection of examining psychologist's functional assessment which conflicted with his own
13 written report and test results). Thus, case law requires not only an opinion from the consulting
14 physician but also substantial evidence (more than a mere scintilla but less than a preponderance),
15 independent of that opinion which supports the rejection of contrary conclusions by examining or
16 treating physicians. *Andrews*, 53 F.3d at 1039.

17 Plaintiff fails to argue which physician's opinion was improperly rejected. (Ct. Rec. 15 at 8-
18 10.) Plaintiff refers generally to "the opinions and diagnoses of the Rockwood Cheney Medical
19 Clinic" without specifically mentioning a particular physician's opinion or discussing the records
20 with specificity.⁴ (Ct. Rec. 15 at 9.) However, the only medical opinion specifically rejected by the
21 ALJ is the opinion of Dr. Koeske. (Tr. 18.) In March 2006, Dr. Koeske reported plaintiff complained
22

23 ⁴As noted by defendant, plaintiff's argument is vague and the court could decline to address it for
24 lack of specificity. See *Carmickle v. Comm'r*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). However,
25 because only one physician opinion was specifically rejected by the ALJ, it appears plaintiff's argument
26 intended to address Dr. Koeske's note indicating plaintiff's activities should be limited. Furthermore,
27 no other physician offered an opinion about plaintiff's limitations or assessed plaintiff's ability to do
28 work-related activities.

1 of pain down the left leg, which she reported as restricting when she bends at the waist to mop at
 2 work. (Tr. 227.) Dr. Koeske instructed her to avoid bending at the waist, mopping and lifting more
 3 than 10 pounds. (Tr. 227.) The ALJ assigned greater weight to the opinion of Dr. Scottolini, a
 4 reviewing physician,⁵ than to Dr. Koeske's opinion. (Tr. 18.) After reviewing the medical record,⁶
 5 Dr. Scottolini opined that plaintiff is leading an active and economically productive lifestyle and that
 6 he believes she is capable of a higher level of exertional activity than that stated in the RFC. (Tr.
 7 205.) He found little objective clinical evidence to support and establish the anatomical or
 8 pathophysiological basis for her many problems. (Tr. 205.) His opinion conflicts with opinion of Dr.
 9 Koeske which suggests limitations on plaintiff's physical activity. Thus, the ALJ was required to
 10 provide specific, legitimate reasons supported by substantial evidence in rejecting Dr. Koeske's
 11 opinion.

12 In rejecting Dr. Koeske's opinion in favor of Dr. Scottolini's, the ALJ cited the lack of
 13 objective evidence supporting the limitations noted by Dr. Koeske. An ALJ may discredit treating
 14

15 ⁵Plaintiff argues that Dr. Scottolini "is not even a consultative examiner as he never met with
 16 Oakes, examined her or even saw her (he was not a medical expert at the hearing)." (Ct. Rec. 15 at 9.)
 17 It is well established that the opinion of a reviewing, nonexamining physician is entitled to weight. "Both
 18 the regulations, 20 C.F.R. § 416.927(d)(1), and our precedent, *see Pitzer*, 908 F.2d at 506 n. 4, state that
 19 the conclusion of a nonexamining expert is generally entitled to less weight than the conclusion of an
 20 examining [or treating] physician. However, giving the examining [or treating] physician's opinion *more*
 21 weight than the nonexamining expert's opinion does not mean that the opinions of nonexamining sources
 22 and medical advisors are entitled to *no* weight." *Andrews*, 53 F.3d at 1041. As noted above, the opinion
 23 of a non-examining physician may be accepted as substantial evidence if it is supported by other evidence
 24 in the record and is consistent with it. *Id.* at 1043; *Lester*, 81 F.3d at 830-31.

25 ⁶Plaintiff points out that Dr. Scottolini reviewed the "few records available" to May 1, 2007,
 26 suggesting that Dr. Scottolini's opinion is not supported by the totality of the record. (Ct. Rec. 15 at 9.)
 27 However, plaintiff fails to address the MRI results or specifically point to any objective evidence in the
 28 record contradicting Dr. Scottolini's opinion.

1 physicians' opinions that are conclusory, brief, and unsupported by the record as a whole or by
2 objective medical findings. *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
3 2004). Furthermore, a physician's opinion may be rejected if it is based on a claimant's subjective
4 complaints which were properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.
5 2001); *Fair*, 885 F.2d at 604. The ALJ pointed out that Dr. Koeske did not have MRI evidence
6 before him. (Tr. 18.) A March 2006 MRI revealed mild degenerative changes and no significant
7 stenosis. (Tr. 250.) Plaintiff's other treating physician at the Rockwood Clinic, Dr. Hough, observed
8 that the MRI is "basically totally normal." (Tr. 228.) The record establishes that Dr. Koeske had no
9 objective basis for recommending limitations and must have relied upon plaintiff's pain report of
10 symptoms, which the ALJ properly discredited. On the other hand, Dr. Scottolini was able to review
11 plaintiff's MRI along with the other medical evidence in forming an opinion. As such, it was
12 reasonable to conclude that Dr. Koeske's statement of plaintiff's limitations was not supported by the
13 evidence, which is a specific, legitimate reason for rejecting the opinion.

14 Additionally, the ALJ considered the results of the conservative treatment prescribed. The
15 ALJ pointed out that Dr. Hough recommended physical therapy for treatment of plaintiff's back pain,
16 and as noted above, and plaintiff's symptoms improved after several sessions. (Tr. 228, 254.) This
17 indicates that even if Dr. Koeske's restrictions were justified at the time he made them, her symptoms
18 and the limitations assessed did not and would not continue with relatively conservative treatment.

19 The ALJ's duty is to resolve evidentiary conflicts, *see Allen v. Heckler*, 749 F.2d 577, 579
20 (9th Cir. 1985) and substantial evidence supports his resolution of the conflicting opinions in this case.
21 The ALJ cited substantial evidence in addition to the opinion of Dr. Scottolini in rejecting Dr.
22 Koeske's assessment. Based on the MRI evidence and plaintiff's improvement after conservative
23 treatment, the ALJ reasonably concluded that the limitations identified by Dr. Koeske were
24 unsupported, and that Dr. Scottolini's consideration of all of the evidence rendered his opinion more
25 persuasive. The ALJ gave specific, legitimate reasons for rejecting the opinion of Dr. Koeske and the
26 reasons are supported by substantial evidence.

27 **4. Hypothetical**

28 Plaintiff argues the hypothetical posed to the vocational expert was incomplete because it

1 “ignored” limitations assessed by Dr. Koeske and “ignored” plaintiff’s testimony regarding her
 2 limitations.⁷ (Ct. Rec. 15 at 14.) An ALJ is free to accept or reject restrictions in a hypothetical that
 3 are not supported by substantial evidence. *Osenbrook v. Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001);
 4 *Magallenes*, 881 F.2d at 756-57. Plaintiff’s step five argument relies on her previous arguments
 5 regarding the ALJ’s consideration of plaintiff’s credibility and the opinion of Dr. Koeske, which were
 6 discussed and rejected *supra*. As a result, plaintiff’s step five argument must also fail. The
 7 limitations identified by the ALJ were included in the RFC and the hypothetical to the vocational
 8 expert. Therefore, the hypothetical to the vocational expert was legally sufficient and the ALJ did not
 9 err.

11 CONCLUSION

12 Having reviewed the record and the ALJ’s findings, this court concludes the ALJ’s decision is
 13 supported by substantial evidence and is not based on error.

14 Accordingly,

15 IT IS ORDERED:

16 1. Defendant’s Motion for Summary Judgment (Ct. Rec. 16) is **GRANTED**.

17 2. Plaintiff’s Motion for Summary Judgment (Ct. Rec. 14) is **DENIED**.

18 The District Court Executive is directed to file this Order and provide a copy to counsel for
 19 plaintiff and defendant. Judgment shall be entered for defendant and the file shall be **CLOSED**.

20 DATED January 3, 2011.

21
 22 S/ JAMES P. HUTTON
 23 UNITED STATES MAGISTRATE JUDGE
 24

25 ⁷As discussed *supra*, the ALJ did not “ignore” plaintiff’s testimony; rather, the ALJ found it not
 26 entirely credible. Similarly, the ALJ did not “ignore” limitations assessed by plaintiff’s treating
 27 physician, but instead provided specific, legitimate reasons supported by substantial evidence for rejecting
 28 them.